I. INTRODUCTION

A. Subjects and Objects of Law

The Roman law of things is the branch of the law that concerns itself with attributing legal objects to legal subjects, ie property rights. Objects of law are commonly called things *(RES)*. They are the objects of legal transactions. They are assigned to legal subjects, who can use them and dispose of them at will.

> *§ 285 Austrian Civil Code (ABGB) defines things as "everything that differs from and is subject to use by humans".*

The term "legal subject" refers to anyone capable of rights and duties, ie a person in the legal sense; hence, we may also speak of "legal personality".

> *Questions concerning the legal status of persons are governed by the law of persons, which is a sub-branch of private law.*

Before taking a closer look at the way legal objects may be assigned to persons, and at the different relationships governed by the law of things, it is important to explain briefly[1] who is capable of rights and obligations under Roman law.

1. Legal status

Today, all human beings are held to be equally capable of rights and duties[2]. In Roman times, in contrast, the legal status of a person was determined by a complex interplay of factors (liberty, citizenship, position within the family hierarchy, and gender).

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1 For reasons of brevity, only a very short overview of the Roman law of persons can be given here.

2 Cf § 16 ABGB, § 1 BGB, Art 11 ZGB. § 16 ABGB reads: "Each human being has inborn rights, as human reason makes evident, and is thus to be considered a person. Slavery or servitude, and the exercise of power connected to these, is forbidden in these countries."

a. Freedom and slavery – *STATUS LIBERTATIS*

Like many legal systems of its time, Roman law recognises the institution of slavery, and consequently distinguishes between free human beings *(HOMINES LIBERI)* and slaves *(SERVI)*. Among the former, it further differentiates between those who were born free *(INGENUI)* and those who were freed later in life *(LIBERTI)*.

> *The majority of slaves were either children of female slaves, or prisoners of war.*

Slaves are incapable of legal rights and duties, and are considered things. As such, they are at the disposal of legal subjects; for instance, they can be sold or pledged to secure a debt.

> *Note: Slaves are incapable of legal rights and duties in their own name; however, under certain circumstances they can exercise rights or incur obligations on behalf of their owners (DOMINI).*

If someone is born free, their status as a legal subject begins at birth.

> *According to Roman law, this applies only if the child is born alive and is of human shape.*

An unborn child *(NASCITURUS)* is incapable of rights and duties; in certain cases, however, it is treated as if it had already been born, according to the principle *NASCITURUS PRO IAM NATO HABETUR, QUOTIENS DE COMMODIS EIUS AGITUR* (unborn children are regarded as already born when this is to their advantage)[3].

> *Consequently, children born after the death of their father may inherit.*

b. Position within the family hierarchy – *STATUS FAMILIAE*

The Roman family is ordered along strictly hierarchical lines, with the children of the house (*FILIAE* and *FILII FAMILIAS*) in the power *(PATRIA POTESTAS)* of the father of the house *(PATER FAMILIAS)*. Among the children of the house are counted all children born in marriage; the legitimate offspring of all sons still in their father's *POTESTAS;* and all adoptive children.

> *Even grown-up children remain in their father's power, unless they have either been released (which can be done through legal means, such as emancipation = liberation from the PATRIA POTESTAS) or have come into the PATRIA POTESTAS of another family (eg through marriage).*

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3 Cf Paulus D 1.5.7; D 50.16.231; § 22 ABGB takes up this principle.

In case of a *MANUS* marriage, the wife *(UXOR IN MANU)* is also in her husband's power, having been given into his *PATRIA POTESTAS* by her family.

> *From the imperial period onwards, however, the so-called MANUS-free marriage seems to have become the norm. This means that a wife who was free (SUI IURIS) before marriage remained so after the wedding.*

As long as a person remains in the *PATRIA POTESTAS,* they are incapable of owning property, even though they have the *STATUS LIBERTATIS.* While they cannot hold property in their own right, they can under certain circumstances acquire possession, ownership, and other legal positions for their *PATER FAMILIAS.*

> *Note: Children of the house and wives who are in the power of the PATER FAMILIAS are considered free men and women, ie they have the STATUS LIBERTATIS.*

c. Citizens and non-citizens – *STATUS CIVITATIS*

Certain rights (apart from political rights also eg the right to have civil-law ownership[4] – *DOMINIUM EX IURE QUIRITIUM* – of a thing) and legal transactions (eg the transfer of ownership by means of *MANCIPATIO*[5]) were reserved for those who had the status of Roman citizens *(STATUS CIVITATIS).*

> *Non-Romans could be granted the COMMERCIUM, which gave them equal rights as far as legal transactions were concerned.*

d. Legal entities

Modern law recognises both natural persons (human beings) and legal entities: groups of natural persons (eg corporations, associations, companies) and assets (eg foundations, trusts) which possess legal personality.

Along similar lines, Roman law regards certain groups of people (corporations = *UNIVERSITATES,* associations = *COLLEGIA, SODALITATES*) and assets as independent legal entities.

> *Examples include the Roman state (RES PUBLICA) as well as its smaller political unities (MUNICIPIA, COLONIAE and Latin communities), professional and cultic associations, burial societies, emerging Christian*

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4 For information on civil ownership, see VII. Fn 1, VIII.B. and X.D. (below).

5 For a more detailed account of *MANCIPATIO,* see VII.A. (below).

churches, foundations for pious purposes (PIAE CAUSAE), as well as the tax farmers' associations (SOCIETATES PUBLICANORUM), which were organised along corporative lines.

These bodies were capable of holding rights (such as the right of ownership), and (through their representatives) could enter into legal transactions. Rights acquired by the corporation did not accrue to its members, nor were individual members bound by its obligations.

Ulpian D 3.4.7.1

SI QUID UNIVERSITATI DEBETUR, SINGULIS NON DEBENTUR: NEC QUOD DEBET UNIVERSITAS DEBENT SINGULI.

If something is owed to a corporation, it is not owed to its individual members, and if the corporation owes something, its individual members do not owe it.

Corporations exist independently of their individual members. Internal relations among members may be determined by the corporation's charter and articles.

2. Legal capacity

For those who are born free, legal personality – that is the capacity to rights and duties – begins at birth.

Example: Agerius' mother dies during childbirth. Baby Agerius survives; driven by grief, his father nonetheless commits suicide shortly afterwards. From the moment of his birth, Agerius is a legal subject. Moreover, his father's death leaves him free of PATRIA POTESTAS. He inherits an estate (which a TUTOR administers for him) and consequently accrues both rights and obligations.

In contrast, legal capacity, that is the ability to enter into binding legal contracts and to acquire rights and assume obligations through one's own actions, demands a degree of maturity both in terms of age and mental abilities.

Example: The administration of the estate – such as the buying of seed or selling of the harvest and conveying a right of ownership to the buyer etc – requires the capacity to enter into binding legal contracts, which Agerius does not have yet.

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Legal capacity can be subdivided into

- capacity to act (transactional capacity), that is the capacity to acquire rights and incur obligations through legally binding actions, particularly by entering into legal contracts, and
- criminal capacity, that is the capacity to be accountable for illegal activities (and to be held liable for damages).

a. Age thresholds

- Infants (*INFANTES* – in the postclassical period up to seven years of age) lack legal capacity.
- Under-age persons (*IMPUBERES INFANTIA MAIORES* or *PUPILLI*), that is boys between ages seven and fourteen and girls between ages seven and twelve, are accorded limited capacity to act. They can enter into binding legal contracts that are exclusively to their advantage (eg they can accept a donation or the cancellation of a debt in their favour). In order to incur obligations or to transfer rights (such as ownership), however, *PUPILLI* need their guardian's consent *(AUCTORITAS TUTORIS)*.

If an under-age person without their *TUTOR*'s consent enters into a contract that entails reciprocal rights and obligations, the result is a so-called *NEGOTIUM CLAUDICANS* (literally, a limping transaction): only that part of the transaction which confers rights on the *PUPILLUS* is valid, while the obligations incurred by the child do not become legally binding[6].

Ulpian D 19.1.13.29

> *SI QUIS A PUPILLO SINE TUTORIS AUCTORITATE EMERIT, EX UNO LATERE CONSTAT CONTRACTUS: NAM QUI EMIT OBLIGATUS EST PUPILLO, PUPILLUM SIBI NON OBLIGAT.*
>
> If someone has bought something from an under-age person without their guardian's consent, the contract is binding only on

6 Cf I 1.21 pr: . . . *NAMQUE PLACUIT MELIOREM QUIDEM (PUPILLUM) SUAM CONDICIONEM LICERE EIS FACERE ETIAM SINE TUTORIS AUTORITATE, DETERIOREM VERO NON ALITER QUAM TUTORE AUCTORE* – because the opinion prevails that without the tutor's consent, an under-age person can only improve their legal position, but not worsen it.

one side: because the buyer is bound to fulfil their obligations towards the child, but the child is not bound to fulfil theirs towards the buyer[7].

Note: In modern law, if an under-age person is party to a legal transaction creating reciprocal obligations, the whole transaction is suspended until their guardian's consent has been obtained[8].

■ In Roman law, a person gains full legal capacity upon reaching *PUBERTAS* (majority). Girls reach this stage at the end of their twelfth year, boys at the end of their fourteenth.

With regard to boys, there was dispute among the rivalling schools of the Sabinians and Proculians concerning the exact moment when majority was attained. The Sabinians were in favour of an individual age threshold, marked by the solemn ceremony at which the boy first assumes the TOGA VIRILIS (the toga of manhood). The Proculians argued for a general age limit of fourteen years. By Justinian times at the latest, the latter view had gained general acceptance.

■ Minors, ie legally capable persons below the age of twenty-five *(MINORES VIGINTIQUINQUE ANNIS),* were protected by the *LEX (P)LAETORIA.* Passed around 200 BC, this law makes it a punishable offence on the part of a business partner to deliberately exploit a minor's lack of experience. Moreover, the *PRAETOR*[9] grants special remedies to minors not only in regard to unconscionable dealings, but also in such cases where a transaction is merely disadvantageous to the minor if viewed from an objective perspective: the minor can either be granted an *EXCEPTIO*[10] *LEGIS LAETORIAE* or the right to claim restitution to the previous position *(RESTITUTIO IN INTEGRUM).* In addition, a guardian *(CURATOR MINORIS)* can be appointed to provide counsel and advice to minors in their business dealings.

During the classical period, the CURATOR MINORIS' approval simply meant that a transaction was deemed unobjectionable. Only by the end of the Diocletian period (end of the 3rd century AD) did the CURATOR's consent become necessary to make the transaction legally binding.

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7 If the guardian does not give his consent, the child can of course be sued for unjust enrichment under a rescript of Emperor Antoninus Pius (cf D 26.8.5 pr; also VIII.C.1.b. [below] and Roman Law of Obligations XIV.K.3).

8 Cf eg § 151 para 1 ABGB, § 108 para 1 BGB, Art 19 ZGB.

9 For the role of the *PRAETOR* in Roman civil procedure, cf X.B.1. (below).

10 For the function of an *EXCEPTIO* in Roman civil proceedings, cf X.E. (below).

b. Roman society imposes severe restrictions on women *(FEMINAE, MULIERES)* both in the private and in the political sphere.

> *Women are not only barred from holding public office (including that of PRAETOR, IUDEX and similar functions) but also excluded from private positions of authority, such as that of head of the family.*

Even women who are *SUI IURIS,* that is neither under paternal *(PATRIA POTESTAS)* nor marital power *(MANUS),* require a women's guardian *(TUTOR MULIERIS)* after attaining their majority *(PUBERTAS)*. They can only perform formal transactions (such as *MANCIPATIO*) or incur legal obligations with his consent.

By the time the classical period had reached its zenith (mid-2nd century AD), the *TUTELA MULIERIS* (women's tutelage) had come to be regarded as a mere formality.

Gai Inst. 1.190

> *FEMINAS VERO PERFECTAE AETATIS IN TUTELA ESSE FERE NULLA PRETIOSA RATIO SUASISSE VIDETUR; NAM QUAE VULGO CREDITUR, QUIA LEVITATE ANIMI PLERUMQUE DECIPIUNTUR ET AEQUUM ERAT EAS TUTORUM AUCTORITATE REGI, MAGIS SPECIOSA VIDETUR QUAM VERA: MULIERES ENIM QUAE PERFECTAE AETATIS SUNT, IPSAE SIBI NEGOTIA TRACTANT ET IN QUIBUSDAM CAUSIS DICIS GRATIA TUTOR INTERPONIT AUCTORITATEM SUAM, SAEPE INVITUS AUCTOR FIERI A PRAETORE COGITUR.*
>
> There is no cogent reason why grown-up women should be under tutelage. Even though it is commonly believed that women are often deceived because of their imprudence and that it is therefore just that they be governed by the authority of a tutor, this is most probably a myth rather than reality. A grown-up woman acts on her own behalf; in some cases, her tutor has to give his consent as a mere formality. Frequently, he can even be forced to do so against his will by the praetor.

c. Mentally disabled people *(FURIOSI)* are generally considered incapable of legal action; neither do they possess criminal capacity. To enable them to take part in legal dealings, a *CURATOR FURIOSI* needs to be appointed for them.

Someone who endangers the livelihood of his family by squandering his inheritance *(PRODIGUS)* can be declared legally incapable by the praetor *(INTERDICTIO)*. He can thus only act on his own behalf where this is exclusively to his benefit; in all other transactions, he is represented by a *CURATOR FURIOSI.*

B. The nature of property rights

Legal subjects may be granted rights over objects of law (things) by the legal system. These are called property rights and

1. are defined with regard to a specific object, entitling their holder to access and use said object in a specific way;
2. are absolute, ie have to be respected by all other members of the legal community.

This is why property rights are also known as real rights or rights *IN REM,* ie rights in things. For the Romans, the fact that property rights are absolute – that is, enforceable against everybody[11] – finds its expression in the so-called *ACTIONES IN REM.*

The term *ACTIO* denotes a court action. The *ACTIO* defines the elements of the claim and enables the rightful claimant to assert his rights in court[12].

Example 1: Clara[13] *has given her precious vase to Midas the banker to keep in his safe. Midas becomes the victim of a burglary: the vase falls into the hands of Hector the thief. Hector sells and delivers it to Ago the antique dealer, who in turn sells and delivers it to Leander the art trader. By chance,*

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11 The antonym of absolute in this context is relational. Relational rights (such as the buyer's right to have delivery of the goods as per contract) typically originate in legal dealings between two particular people – creditor and debtor – and only subsist between those two. In Rome, relational rights can be asserted by means of *ACTIONES IN PERSONAM.*

12 For the *ACTIO,* cf X. (below).

13 In the interests of a didactic concept that promotes gender equality, the examples and exercises in this book feature both male and female protagonists. As regards the scope of Roman women's legal capacity, for the purposes of the cases described here the female protagonists are assumed not to be under *TUTELA MULIERIS.* In fact, the marriage laws of Augustus freed women possessing the *IUS LIBERORUM* from tutelage. For the lack of importance accorded to women's tutelage in classical times cf Gai Inst 1.190 (above at A.2.b).

Clara rediscovers the vase in Leander's shop. Since Clara has a right in rem to the vase, she can now bring an ACTIO IN REM against Leander.

Property rights thus convey power over things which can be enforced at law against all other persons.

For Roman jurists, the concept of power over an object was conceivable only in relation to corporeal things. Corporeal things – *RES CORPORALES* – are those which can be touched: *QUI TANGI POSSUNT.*

A piece of land, a table, a ring, and in Rome also a slave are all examples of things that are corporeal.

§ 292 ABGB mentions things "which fall within the senses", thus highlighting the role of sensory perception in the definition of corporeal things[14].

Roman property law thus deals with the right to hold power over corporeal objects. Rights themselves, in contrast, are regarded as incorporeal objects by the Romans; generally speaking, this makes it impossible to have a property right in a right[15].

C. Types of property rights

The extent of the power the holder of a right has over an object is determined by the precise nature of that right: Roman law differentiates between types of property rights according to the scope and amount of power they confer over an object.

Example 2: If Laura owns a vineyard, she can cultivate it, but also sell it. If she only holds the vineyard in usufruct (USUSFRUCTUS), she is only entitled to cultivate it, but not to sell it. If she holds it as a pledge (PIGNUS), she is not entitled to cultivate the vineyard, but may be entitled to sell it under certain circumstances.

Roman property rights fall into a fixed number of categories depending on their scope and content: ownership *(DOMINIUM, PROPRIETAS),* servitudes *(SERVITUTES),* pledge/lien *(PIGNUS),* emphyteutic lease, that is the right to cultivate another's land for one's own profit,

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14 It has to be stressed, however, that the ABGB defines things very broadly and does not limit the meaning of the term to corporeal objects. Cf § 285 ABGB: *"Everything that differs from and is subject to use by humans is in the legal sense called a thing."*

15 One exception to this rule is the possibility of pledging a right to secure a debt *(PIGNUS NOMINIS).*

and to bequeath this right to one's heirs *(EMPHYTEUSIS),* and hereditary building rights, ie the right to erect and maintain a building on another's land, and to bequeath it to one's heirs *(SUPERFICIES)*.

It is impossible to add to these property rights through individual legal transactions. The number of rights in rem is limited; this is termed the "numerus clausus of property rights."

For each of these types a specific *ACTIO IN REM* can be brought:

the *REI VINDICATIO* for ownership,

the *VINDICATIO SERVITUTIS* for servitudes,

the *VINDICATIO PIGNORIS* (= *ACTIO PIGNERATICIA IN REM*) for pledge/lien,

the *REI VINDICATIO UTILIS* for *EMPHYTEUSIS,*

and the *ACTIO DE SUPERFICIE* for the right to have a building on another's land.